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U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: TEXAS SERVICE CENTER Date: JUN 0 2 2009
XLU-88-137-01006

IN RE: Applicant: [redacted]

APPLICATION: Application for Status as a Temporary Resident pursuant to Section 210 of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1160

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. If your appeal was dismissed or rejected, all documents have been returned to the National Benefits Center. You no longer have a case pending before this office, and you are not entitled to file a motion to reopen or reconsider your case. If your appeal was sustained or remanded for further action, you will be contacted.

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Application for Temporary Resident Status as a Special Agricultural Worker was denied by the Director, Texas Service Center. The decision is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that on April 7, 1988, the applicant filed an Application for Temporary Resident Status as a Special Agricultural Worker under section 210 of the Immigration and Nationality Act, 8 U.S.C. § 1160. On October 7, 1991, the Director, Southern Service Center (now the Texas Service Center), denied the application because the applicant failed to submit court dispositions related to arrests for *Burglary of Automobile*[1] and *Driving Under the Influence*. The applicant filed a notice to appeal the denial with the Legalization Appeals Unit. On July 2, 2008, the Director dismissed the appeal and *sua sponte* reopened the application. On September 3, 2008, the Director denied the application based on the applicant's criminal convictions for *Driving Under the Influence*, *Driving While Impaired* and *Driving Under the Influence of Alcoholic Liquor*.

On appeal, counsel asserts that the applicant's initial SAW application and treatment constituted an entry and thus would not be otherwise be subject to the INA Section 212 regulations related to inadmissibility. Counsel contends that because the applicant made an entry prior to IIAIIRA (IIRIRA), there maybe an issue as to burden of proof related to disqualifying convictions. Counsel further contends that USCIS should be collaterally estopped from making a finding that the applicant's criminal convictions constitute a crime involving moral turpitude and given the 20 year span should not be estopped from denying the applicant the benefit. Counsel resubmits his previously furnished rebuttal to the Director's Notice of Intent to Deny (NOID). The entire record was reviewed and considered in rendering a decision on the appeal.

In order to be eligible for temporary resident status as a special agricultural worker, an alien must have engaged in qualifying agricultural employment for at least 90 man-days during the twelve-month period ending May 1, 1986, and must be otherwise admissible under section 210(c) of the Act and not ineligible under 8 C.F.R. § 210.3(d). 8 C.F.R. § 210.3(a). An applicant has the burden of proving the above by a preponderance of the evidence. 8 C.F.R. § 210.3(b).

An alien who has been convicted of a felony or three or more misdemeanors in the United States is ineligible for temporary resident status. 8 C.F.R. § 210.3(d)(3).

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[1] A Federal Bureau of Investigation (FBI) report based upon the applicant's fingerprints reveals that on May 31, 1986, the applicant was arrested by the Brownsville Police Department and charged with *Burglary of an Automobile*. Counsel furnished a document entitled "Defendant Data Sheet," which shows that the applicant's arrest for *Burglary of a Vehicle* was dropped. Attached to this document is a letter from an attorney in Brownsville, Texas, which states that the document is the applicant's criminal case sheet from the Cameron County database. It states that the charge was dropped by the District Attorney's Office and no formal charges were filed against the applicant.

"Felony" means a crime committed in the United States punishable by imprisonment for a term of more than one year, regardless of the term such alien actually served, if any, except when the offense is defined by the state as a misdemeanor, and the sentence actually imposed is one year or less, regardless of the term such alien actually served. Under this exception, for purposes of 8 C.F.R. Part 245a, the crime shall be treated as a misdemeanor. 8 C.F.R. § 245a.1(p).

"Misdemeanor" means a crime committed in the United States, either (1) punishable by imprisonment for a term of one year or less, regardless of the term such alien actually served, if any, or (2) a crime treated as a misdemeanor under 8 C.F.R. § 245a.1(p). For purposes of this definition, any crime punishable by imprisonment for a maximum term of five days or less shall not be considered a misdemeanor. 8 C.F.R. § 245a.1(o).

Counsel asserts that the applicant's initial SAW application and treatment constituted an entry and thus would not be otherwise be subject to the INA Section 212 regulations related to inadmissibility. Counsel further contends that USCIS should be collaterally estopped from making a finding that the applicant's criminal convictions constitute a crime involving moral turpitude. First, the AAO notes that an alien who is seeking to adjust his status to that of a temporary or permanent resident is assimilated to the position of an applicant for entry into the United States. *Pei-Chi Tien v. INS*, 638 F.2d 1324, 1327-8 (5th Cir.1981); *Yui Sing Tse v. INS*, 596 F.2d 831, 834 (9th Cir.1979); *Matter of Hernandez-Puente*, 20 I&N Dec. 335, 337 (BIA 1991). For this reason, the applicant remains an individual seeking admission to the United States through his application for adjustment of status. Second, the applicant's admissibility is not at issue in this proceeding. At issue in this proceeding is whether the applicant's criminal convictions render him ineligible for temporary resident status pursuant to 8 C.F.R. § 210.3(d)(3).

Counsel contends that because the applicant made an entry prior to IIRIRA, there may be an issue as to burden of proof related to disqualifying convictions. Counsel resubmitted his NOID rebuttal as his appellate brief. In the rebuttal, counsel asserts that in relation to the applicant's 1990 and 1994 offenses, USCIS should apply the definition of conviction as stated prior to the enactment of IIRIRA. Counsel cites to the definition of conviction determined by the Board of Immigration Appeals in *Matter of Ozkok*. Counsel contends that USCIS has the burden of establishing the applicant's ineligibility for SAW related benefits. The AAO finds counsel's assertions to be without any merit. The burden is on the applicant to provide affirmative evidence to establish that he is eligible for the benefit sought. Pursuant to the regulation at 8 C.F.R. § 210.3(b), the applicant has the burden of proving his eligibility for adjustment of status under section 210 of the Act by a preponderance of the evidence. Further, the previous definition of conviction under *Matter of Ozkok*, 19 I&N Dec. 546 (BIA 1988) has been replaced by section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A).

Section 101(a)(48) provides:

> (A) The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where—
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> (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
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> (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

This definition of conviction applies to convictions and sentences entered before, on, or after September 30, 1996. Section 322(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009. Therefore, the new definition of conviction is applied retroactively. *See Matter of Punu*, 22 I&N Dec. 224 (BIA 1998).

Having established the burden of proof and the governing law in these proceedings, the issue to be addressed is whether the applicant's criminal convictions render him ineligible for temporary resident status. Court dispositions in the record reveal that the applicant has been convicted, pursuant to 8 C.F.R. § 245a.1(o), of the following misdemeanor offenses:

- On July 28, 1990, the applicant was convicted of *Driving While Intoxicated* in violation of section 40-6-391A of the Code of Georgia and sentenced to probation (Dalton Municipal Court, [redacted]. The maximum term of imprisonment for a first conviction under this statute is not more than one year. Ga. Code Ann. § 40-6-391(c) (West 1990).

- On December 22, 1994, the applicant was convicted of *Driving While Under the Influence of Alcoholic Liquor* in violation of section 60-6, 196 of the Nebraska Revised Statutes and sentenced to six months probation (County Court of Dawson County, [redacted] An individual who has not had a conviction under this section in the eight years prior to the date of the current conviction is guilty of a Class W misdemeanor. Neb. Rev. Stat. § 60-6, 196(2) (West 1995). The maximum term of imprisonment for a first Class W misdemeanor offense is 60 days. Neb. Rev. Stat. § 28-106 (West 1995).

- On July 20, 2001, the applicant was convicted of *Driving While Impaired* in violation of section 20-138.1(a) of the North Carolina General Statutes and sentenced to twelve months probation (court and case number unknown). The disposition indicates that the applicant was sentenced to DWI – Level 3. Level three punishment constitutes a maximum term of imprisonment of not more than six months. N.C. Gen. Stat. Ann. § 20-179(i) (West 2002).

Finally, a Federal Bureau of Investigation (FBI) report based upon the applicant's fingerprints reveals that on March 24, 1987 he was arrested for *Driving Under the Influence* by the Polk County (Florida) Sheriff's Office in violation of section 316.193 of the Florida Statutes ([redacted]). The maximum term of imprisonment for a first violation of this statute is not more than six months. Fl. Stat. Ann. § 316.193(2) (West 1987). The record reflects that on February 23, 1991, the Director, Southern Regional Processing Facility, requested a court certified copy of the final disposition related to this offense. However, the applicant failed to furnish a court disposition. He instead furnished a Florida Department of Law Enforcement criminal history record. The record establishes what was already known, namely, that the applicant had been charged on March 24, 1987 for *Driving Under the Influence*; however it falls short of providing the final disposition of the offense.

In conclusion, the applicant has not met his burden of proof in establishing his eligibility for temporary resident status pursuant to 8 C.F.R. § 210.3(b). The record reveals that the applicant has been convicted of three misdemeanors, and charged with one misdemeanor. There is no documentation in the record to show that he has not been convicted of these offenses. The applicant is, therefore, ineligible for temporary resident status under section 210 of the Act. 8 C.F.R. § 210.3(d)(3). No waiver of such ineligibility is available.

ORDER: The appeal is dismissed. This decision constitutes a final notice of ineligibility.